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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. ~~75-~~445

GENERAL ELECTRIC CREDIT CORPORATION,

Petitioner

VS.

T. R. GRUBBS, d/b/a T. R. GRUBBS TIRE & APPLIANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 2, 1975.

OPINION BELOW

The cause of action giving rise to this Petition has a long history in the federal court system. The Questions presented for Review in this Petition are the product of a trial in 1969, an appeal in 1973, a rehearing on remand in 1974, and a second appeal in 1975. The opinions below are as follows:

(1) April 10, 1970 - Judgment with findings of fact and conclusions of law entered by the United States District Court, Eastern District of Texas, unreported;

(2) April 13, 1973 - First appellate opinion on the merits by the United States Court of Appeals, Fifth Circuit, reported as General Electric Credit Corp. v. Grubbs, 478 F.2d 53 (5th Cir., 1973);

(3) July 18, 1974 - Judgment with findings of fact and conclusions of law entered after hearing on remand by the United States District Court, Eastern District

of Texas, unreported; and

(4) June 2, 1975 - Second appellate opinion (per curiam) by the United States, Court of Appeals, Fifth Circuit, as yet unreported.

Each of these opinions and judgments is reproduced in the appendix to the Petition.

The United States Court of Appeals, Fifth Circuit, also entered an opinion in this cause on a jurisdictional issue unrelated to that presented by this petition, and said opinion is reported as General Electric Credit Corporation v. Grubbs, 447 F.2d 286 (5th Cir., 1971). This Court granted certiorari on said jurisdictional issue and reversed the Court of Appeals, Grubbs v. General Electric Credit Corporation, 405 U.S. 699 (1972). These two opinions are on issues unrelated to those presented in this petition and are not reproduced in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals of which Petitioner here seeks review was

entered on June 2, 1975. Petitioner filed a timely Petition for Rehearing which was overruled on July 2, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Where T. R. Grubbs as counterclaimant originally sought damages on his counterclaim in excess of $150,000.00, and the trial court awarded damages on that counterclaim in the amount of $20,000.00; where T. R. Grubbs did not appeal or cross-appeal the trial court's denial of his claim in excess of $20,000.00 but rather appeared in the appellate court strictly as appellee seeking affirmance; may T. R. Grubbs on rehearing on remand reopen his counterclaim and seek and receive an enlarged award of damages over and above those the trial court originally awarded?

II. Did the trial court's action on rehearing on remand in enlarging T. R. Grubbs' recovery on his counterclaim from the $20,000.00 originally awarded in 1970 to the $105,609.78 awarded in 1974,

without there having been an appeal or cross-appeal by T. R. Grubbs seeking such relief, and without new or amended pleadings prior to the rehearing on remand stating a claim for such relief, result in a deprivation of General Electric Credit Corporation's property without notice and without procedural due process of law?

STATEMENT OF THE CASE

The instant suit began in 1964 as a suit by GECC on a promissory note executed and delivered to it by T. R. Grubbs. Mr. Grubbs counterclaimed against GECC and also brought several other parties to the suit. Mr. Grubbs' counterclaim against GECC sought damages sounding in libel, slander, fraud, tortious interference with contractual relations, wrongful repossession, conversion, allegations of anti-trust violations, and several others. At the conclusion of the first trial in 1970, the trial court denied GECC recovery on its promissory note, made several findings of fact in Mr. Grubbs' favor on his counterclaim, and awarded Mr. Grubbs damages

on his counterclaim in the amount of $20,000.00 citing as grounds therefor "... destruction of Grubbs' business ..." (Appendix to the Petition, P. A-8.) GECC appealed the judgment both as to its recovery on its promissory note, and as to the award of damages on Mr. Grubbs' counterclaim. Mr. Grubbs did not cross-appeal but rather appeared strictly as an appellee seeking only the affirmance of the trial court's judgment. The Appellant's Points for Review, the Appellee's Counter Points, and the Conclusions and Prayers from both Appellant's and Appellee's briefs in the initial appeal are reproduced in the Appendix.

When the Court of Appeals first ruled on this case, it ruled on a jurisdiction point concerning the propriety of the removal of the suit to federal court, 447 F.2d 286 (5th Cir., 1971), which ruling this Court subsequently reversed, 405 U.S. 699 (1972). The Court of Appeal's subsequent opinion on the merits of this case, 478 F.2d 53 (5th Cir., 1973), resulted in a reversal of the trial court's refusal to grant GECC recovery on its note, a

reversal of the trial court's findings and conclusions on Mr. Grubbs' allegations of slander, and an affirmance of the trial court's findings and conclusions on Mr. Grubbs' allegations of wrongful repossession, conversion, and tortious interference with contracts. Due to the trial court's general award of damages on Mr. Grubbs' counterclaim, the Court of Appeals could not determine which dollar damages it was reversing and which dollar damages it was affirming, and it therefore remanded the cause for the specific and limited purpose of making a precise determination of the damages on the portions of Mr. Grubbs' counterclaim that were being affirmed.

On hearing on remand, the trial judge entered judgment on Mr. Grubbs' counterclaim only on the three grounds for recovery of damages which had been affirmed and had been remanded for specific findings of fact. However, using only those three grounds of recovery, the trial judge enlarged Mr. Grubbs' recovery from $20,000.00 to the sum of $105,609.78.

GECC appealed, and by per curiam opinion the

Court of Appeals affirmed the enlarged recovery on the counterclaim, citing only that Court's prior opinion at 478 F.2d 53 as the rationale for its opinion.

Federal court jurisdiction in the first instance was the subject of a prior review on certiorari by this Court, and the propriety of federal jurisdiction was upheld in Grubbs v. General Electric Credit Corporation, 405 U.S. 699 (1972).

ARGUMENT ON QUESTION I.

A. Considerations on Certiorari.

GECC would respectfully submit the following reasons for this Court's granting certiorari in the instant cause:

(1) The Court of Appeals by its 1975 per curiam opinion has sanctioned the action of the trial court in completely departing from the accepted and usual course of judicial proceedings so as to destroy the fundamental fairness of the trial below and to call for an exercise by

this Court of its supervisory powers; and

(2) the ruling by the Court of Appeals in affirming the trial court's action in this case is in direct conflict with rules of decision set down by this Court, the rules of decision as applied by every other circuit in the nation, and in direct conflict with thirty years of precedent in the Fifth Circuit itself.

B. Argument on the Question.

GECC respectfully submits that even the minimum record attached as the Appendix to this Petition shows clearly that T. R. Grubbs' rights under the judgment on his counterclaim were enlarged approximately five-fold when the trial court reconsidered Mr. Grubbs' counterclaim on remand. The same minimum record clearly shows that when the trial court originally awarded $20,000.00 on Mr. Grubbs' counterclaim, and thereby denied Mr. Grubbs' allegations of and prayer for damages in excess of $20,000.00, Mr. Grubbs did not appeal or cross-appeal that

determination. GECC submits that, as a result of Mr. Grubbs' choice not to appeal those aspects of the original trial judgment which were adverse to him, such aspects of the original judgment became final and conclusive as a matter of federal procedural law and the trial court was without jurisdiction on remand to reopen and readjudicate those matters.

The procedural rule on which GECC relies has been the rule of practice in the federal court system since the Nineteenth Century. See Canter v. American & Ocean Insurance Co., 3 Pet. 307, 7 L.Ed 688 (1828); United States v. Blackfeather, 155 U.S. 218 (1894). The opinion of this Court generally cited as the key opinion on the rule of practice in the federal courts requiring a party to file his own appeal or cross-appeal in order to complain of any adverse rulings against him by a lower court is U. S. v. American Railway Express Co., 265 U.S. 425 (1924). Abstracting the rule in question from the opinions of this Court, and borrowing liberally from 9 Moore's Federal Practice (2d Edition), Par. 204.11

p. 927, et seq, GECC submits that a victorious or partially victorious party from trial below, who has not appealed or cross-appealed rulings adverse to him, will not be heard except in support of the trial judgment and may not seek an enlargement of his rights and recoveries when the case in question is brought up for review on the appeal of another party. As early as 1937, Mr. Justice Cordozo referred to this rule of federal court procedure as "inveterate and certain", Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185 (1937). This rule of practice has never been abandoned; at least not until the Court of Appeal's decision doing so in the instant suit.

There are few cases dealing with an enlargement of an appellee's recovery on remand. The circumstances giving rise to such a case do not occur often since matters not brought to the Courts of Appeals by points for appellate review are almost invariably recognized as being abandoned and concluded, and, once again, a long standing rule of federal procedure holds that matters concluded on

the appellate level shall not be reopened on subsequent remand, Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904). However, there is one clear Court of Appeals opinion dealing with such a set of circumstances, the enlargement of a plaintiff-appellee's recovery after remand, and ironically it is a Fifth Circuit case, Lettsome v. U.S., 434 F.2d 907 (5th Cir., 1970). The Lettsome Case is factually "on all fours" with the instant cause. On the first appeal of the Lettsome Case, 411 F.2d 917, the Fifth Circuit remanded the cause with instructions to the trial court to make further findings of fact, just as was done on the first appeal of this instant cause. In the Lettsome Case, the trial court on hearing on remand increased the dollar damages awarded to the plaintiff-appellee, just as was done by the trial court on remand in this instant cause. However, on the second appeal of the Lettsome Case, the Fifth Circuit reversed the trial court's enlargement of the plaintiff-appellee's recovery, and it is the different treatment in this instant cause of which GECC complains.

The trial court's enlargement of T. R. Grubbs' recovery on remand did come too late, as the Fifth Circuit reasoned in the Lettsome Case, supra. T. R. Grubbs did acquiesce to and become concluded by the trial court's original determination that his damages did not exceed $20,000.00 when he elected not to seek timely review of that determination, as this Court reasoned in Alexander v. Cosden Pipe Line Co., 290 U.S. 484 (1934). GECC respectfully submits that the Court of Appeal's affirmance herein sanctioned a totally unauthorized excursion by the trial court beyond his jurisdictional limits to GECC's prejudice and for which GECC prays review.

ARGUMENT ON QUESTION II

A. Considerations on Certiorari

GECC would respectfully submit the following reasons for this Court's granting certiorari in the instant cause:

(1) The action of the trial court in re-opening T. R. Grubbs' counterclaim and readjudicating the damages on said

counterclaim upwards by some $85,000.00, as sanctioned by the Court of Appeals' per curiam affirmance herein, without there having been an appeal or cross-appeal by T. R. Grubbs complaining of the original $20,000.00 award, deprived GECC of its property without notice or an opportunity to be heard, all in violation of the constitutional guarantees of due process contained in Amendments V and XIV of the Constitution; and

(2) The Court of Appeals' affirmance herein sanctioned the departure by the trial court from established procedures set down by this Court's opinions, which procedure was designed to provide notice and the opportunity to appear and defend.

B. Argument on the Question

The trial court's departure from established court practices and procedures, and the Court of Appeals' affirmance of that departure, has consider-

ably more impact than a mere procedure irregularity. GECC has had $85,000.00 lifted from its treasury as a result of judicial process without ever having notice of such exposure or the opportunity to present its defenses. There can be no more fundamental deprivation of due process of law in a civil cause than what is called "trial by ambush", and that is what occurred in the instant suit. In 1940, this Court reviewed on certiorari the case of LeTulle v. Scofield, 308 U.S. 415 (1940). In granting certiorari, this Court said as follows:

> We took this case because the petition for certiorari alleged that the Circuit Court of Appeals had based its decision on a point not presented or argued by the litigants, which the petitioner had never had an opportunity to meet by the production of evidence, 308 U.S. 415, 416.

GECC can only adopt and readvance Petitioner LeTulle's argument. As will be shown below, GECC too has been deprived of its day in court.

This Court had recent opportunity to examine and discuss the role notice plays in procedural due process in the case of Fuentes v. Shevin, 407 U.S. 67 (1972). The opening and fundamental premise of law set out in the Fuentes opinion is as follows:

> For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified', 407 U.S. 67, 80.

It was this element of notice, this foundation element for our system of due process, which was denied GECC.

The action of the trial court of which GECC did not have notice was the reopening and de novo adjudication of T. R. Grubbs' counterclaim for damages. At no time after the trial court entered the initial judgment in this matter in 1970, did any party indicate in any way an intention to preserve for further consideration Mr. Grubbs' claim

for damages over and above the $20,000.00 award. The procedural rule which deemed the issue concluded when it was not appealed seemed perfectly satisfactory to all concerned.

GECC had no opportunity to present facts or law on the issue of damages in excess of $20,000.00 at the first appeal herein. Mr. Grubbs, by his own election, chose not to appeal or cross-appeal under some theory that the evidence at trial compelled a higher damage award. Mr. Grubbs did not even attempt to assign cross error in the appeal brought by GECC, a method common in the courts of Texas although procedurally improper in the federal courts. Such notice and opportunity to be heard was GECC's due, for in order to take a "second bite at the apple" of his counterclaim Mr. Grubbs would have been required to show the trial court's refusal to grant damages over $20,000.00 had been in error; a position GECC would have had a right to oppose. There was no notice to GECC on the first appeal that Mr. Grubbs' claim for damages in excess of $150,000.00 was anything other than

a concluded issue, a claim which GECC had met with testimony and evidence and partly defeated.

There was no meaningful notice to GECC that it was to be called upon to do more at the rehearing on remand than participate in an allocation of the general, blanket award of damages among the various grounds for liability which the trial court had originally found. There were no new or amended pleadings at this rehearing on remand. The only notice which GECC received of its exposure to trial de novo on Mr. Grubbs' counterclaim was a belated action by the trial court on an offer of judgment entered by GECC. Pursuant to the provisions of Rule 68 of the Federal Rules of Civil Procedure, GECC did file an offer of judgment in November of 1973 to concede the full $20,000.00 damages originally found by the trial court. The trial court did not rule on GECC's offer of judgment until February 26, 1974, which offer of judgment he overruled, and put GECC to trial on April 2, 1974. That is the only notice which GECC received at any time that the trial court considered itself empowered

to readjudicate Mr. Grubbs' initial claim for damages in excess of $20,000.00.

The initial trial of this cause in 1969 took days. GECC was called on to bring witnesses in from across the country. A considerable volume of documentary evidence was amassed and presented to the trial court. One consequence of this effort was the trial court's determination that the evidence did not support Mr. Grubbs' counterclaim for over $150,000.00, but rather only $20,000.00 in damages had been proved. Because Mr. Grubbs elected not to appeal that adverse determination, GECC was never called on to defend its effort before the Court of Appeals. Without the benefit of a reviewing court's consideration of the issue, without a mandate from the Court of Appeals informing all parties of the need for a new trial, the trial court, on his own initiative, reopened the matter, reversed himself, and enlarged Mr. Grubbs' recovery five-fold. GECC was not afforded its rightful due process of law, did not even get a tolerably fair trial, and GECC prays this Court review the Court

of Appeals' sanctioning of this action.

DISPUTED ISSUES ON REVIEW

The Questions for Review presented in this Petition are uniquely clear in this case. The facts are frozen and immutable; the "facts" are the pleadings, briefs, and positions taken by the parties at the various procedural levels in this suit's history. The law in question is over a century old, it has been clearly defined since the 1930's, and nothing about this case calls for a consideration of change or the application of an exception. Because the entire results of the suit are reduced to money judgments which can be easily compared, the impact of the action in question and the prejudice to GECC is undisputable. The only arguable ambiguity is the interpretation of the Court of Appeals' opinion on the first appeal of this suit; however, when that opinion is read in conjunction with the points of appeal presented to the Court of Appeals in that first appeal, even that ambiguity resolves with ease.

PRAYER

GECC prays that this Court grant certiorari herein.

Respectfully submitted,

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APPENDIX

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Judgment, U.S. District Court, Eastern District of Texas, April 10, 1970 . . . . . A-1

Memorandum Opinion with Findings of Fact and Conclusions of Law, U. S. District Court, E. D. Tex., March 20, 1970 . . . . . A-3

Appellant's Brief (extracts), In the U. S. Court of Appeals, Fifth Circuit (1970 Appeal). A-9

Appellee's Brief (extracts), In the U. S. Court of Appeals, Fifth Circuit (1970 Appeal). A-11

Opinion, General Electric Credit Corporation v. Grubbs, 478 F.2d 53 (5th Cir., 1973). A-14

Judgment, U. S. District Court, E. D. Tex., July 18, 1974. . . . . A-25

Memorandum (with Findings of Fact and Conclusions of Law), U. S. District Court, E. D. Tex., July 18, 1974 . . . . . A-28

Opinion, General Electric Credit Corporation v. Grubbs, June 2, 1975, 5th Cir. (Unreported). A-37